United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-2694

United States Court of Appeals
For the Second Circuit

B

P/S

FRANCIS X. DONOVAN,
Plaintiff-Appellant.

-against-

PENN SHIPPING CO., INC. and
PENN TRANS. CO., INC.,
Defendants-Appellees.

PLAINTIFF-APPELLANT'S REPLY BRIEF

PAUL C. MATTHEWS
Attorney for Plaintiff-Appellant
11 Broadway
New York, N.Y. 10004

DICK BAILEY PRINTERS, 290 Richmond Ave., Staten Island, N.Y. 10302
Telephone: (212) 447-5358

3

TABLE OF CONTENTS

CASES CITED

Addendum

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANCIS X. DONOVAN,

Plaintiff-Appellant,

- against -

PENN SHIPPING CO., INC. and PENN TRANS. CO., INC.,

Defendants-Appelles.

PLAINTIFF-APPELLANT'S REPLY BRIEF

POINT I

APPELLEE'S AD HOMINEM ATTACKS ON PLAINTIFF-APPELLANT'S COUNSEL ARE NEITHER JUSTIFIED NOR PROPER.

Over 300 years ago, an English author wrote.

> "If at any time you find you have the worst end of the staff, leave off your cause and fall upon the person of your adversary."

Perhaps this is an explanation for certain remarks contained in appellee's brief charging plaintiff's counsel with "willful over-advocacy" and implying an intention to deceive the Court. A few examples will suffice to demonstrate the lack of basis for these charges.

A. The statement at page 16 of appellant's brief that defendant calculated the maximum damages justified

by the evidence to be $56,000 in addition to pain and suffering is an accurate one.

Admittedly appellant's reference to page 7 of his brief on the motion for reargument (A114) was an over-simplification of a complex computation. There was no intent to deceive the Court that the reference was to a page of defendant's brief.* The following are the page references to defendant's brief.

1.	Loss of earnings 6/4/70-12/1/70 (def. brief pages 4,7 (A86,A89)	$ 6,000
2.	Loss of overtime while working (def. brief page 8 (A90))	$14,000
3.	Loss of earnings while prevented from working 12/1/70-2/22/74 (A91)	$ 8,400
4.	Discounted loss of earnings while prevented from working for future 11 years. (A91)	$27,700
	Total.	$56,100

* Appellant did, however, place wrong numbers for Appendix page references in Defendant's brief. Thus page 7 of defendant's brief is actually A89, page 8 is A90, page 9 is A91.

B. Plaintiff did not intentionally misstate any facts regarding the waiver of his right to a new trial.

When counsel fo appellant prepared his brief and appendix, he was under the impression that he had written to Judge Gurfein on August 16, 1974 accepting the remittitur under protest. A copy of the letter could not be located. When counsel for appellee stated in his brief on page 13 that plaintiff "refused to clarify his position until August 6,1975" plaintiff appellant's counsel asked for, and received from counsel for appellee a copy of the letter in question, which had in fact been written on October 8,1974. The misstatement as to the date of the letter was completely inadvertent, and hardly justified appellee's inaccurate response. The letter is reproduced at page 122 of the supplemental appendix. It refutes the statement at page 2 of appellee's brief that plaintiff "concealed from the defendant his acceptance of the remittitur under protest".

C. At page 18 of appellee's brief, he implies that plaintiff improperly referred to matters from the Union contract which were not in evidence in his summation. This accusation is without basis.

To refute this serious charge, it is necessary to refer to plaintiff's summation, which is not reproduced in the appendix. The pertinent pages are contained in the trial transcript at pages 309-316, and are reproduced in the supplemental appendix at pages SA 123 - SA 130

First of all, appellee complains on page 17 of its brief of plaintiff's "overreaching" because Exhibit 10 was introduced "on the plaintiff's motion... with no amplifying proof." This is hardly a fair complaint in view of defendant's objection to plaintiff's evidence laying a foundation for the exhibit and defendant's offer to stipulate to the provisions of the union contract (A20-A21). Apparently satisfied, counsel for defendant chose to have Exhibit 10 go into evidence (A61) rather than the stipulation he had earlier suggested. Then, during plaintiff's summation (SA 124) he interrupted to question whether the premium pay provisions of the union contract were in evidence.

Despite defense counsel's efforts to muddy the waters, there was accurate evidence in the record as to premium pay. Plaintiff testified (A19) that work on Saturdays, Sundays and holidays was now called premium overtime and was paid for at the rate of $5.16 per hour

on tankers. This testimony was correct to the penny (A76). Exhibit 10 showed this to be $5.15 ($5.09 plus 6¢) Counsel for plaintiff described this in his summation as an increase of $1.65 per hour over what plaintiff was receiving at the time of his accident.(SA 124) Actually, it represents an increase of $1.72 per hour, or $129 per month.(A 78)

Likewise, plaintiff's claim of increase in base pay of $115 per month(SA 126) was based on evidence in the record Counsel for defendant conceded base pay at the time of the accident to be $475 (A16). At the time of the trial it was over $590 (A75-A76)

As for the "anticipated increases into the future" mentioned at page 17 of appellee's brief, the only future increases described by plaintiff's counsel were the $29 increase in base pay already contracted for which counsel underestimated as $20 (SA 123) and the 25¢ hourly increase in premium pay already contracted for(A75-A76)

D. The question of interest.

Appellee states at page 13 of his brief that, contrary to rule, plaintiff submitted a judgment on an ex parte basis. He does not cite the rule. Rule 58 of the Federal Rules of Civil Procedure provides, in part:

".....Attorneys shall not submit forms of judgment except upon direction of the court....."

Counsel for plaintiff asked Judge Gurfein by letter of April 30, 1974 to have the clerk enter judgment with interest from the date of the verdict.(A80) No reply was ever received. This was before defendant's "formal notice of motion".(A81) After the denial of plaintiff's motion for reargument, plaintiff wrote to Judge Gurfein on October 8, 1974 accepting the remittitur under protest and requesting certification under 28 USC 1292(b).(SA 122) The reply to that letter is contained at A117. Plaintiff had already filed his notice of appeal. In July, 1975, counsel for plaintiff received a telephone call from Judge Werker's minute clerk asking plaintiff to prepare a judgment. It was in response to this direction that plaintiff's counsel prepared a judgment with interest from the date of the verdict, precisely the same relief as requested in the letter of April 30,1974.

Counsel for appellee at page 14 of his brief asserts that the failure of plaintiff's counsel to call to the attention of Judge Werker the cases of Kotsopoulos V.

Asturia, 467 F2d 91 and Reinertsen v. Rodgers, 403 F. Supp. 1263,"appears to be wilful over-advocacy". If counsel for appellee had read Kotsopoulos carefully he would have learned that plaintiff in that case did not appeal from the refusal of the trial court to amend the judgment so as to allow interest from the date of the original findings of fact. Plaintiff instead appealed from the failure of the district court to allow interest on the judgment, an issue on which this court reversed. The Court of Appeals in Kotsopoulos did not have before it the question of pre-judgment interest and thus did not pass on that issue.

Reinertsen v. Rogers, was decided by Judge Frankel on December 2, 1975. At page 10 of its brief, appellee asserts that "the plaintiff was again denied because of overreaching on the question of interest". That is hardly an accurate characterization of the Reinertsen case. True, Judge Frankel did deny interest to plaintiff from the date of the first jury verdict. However, defendant contended that no interest should be allowed during the pendency of the appeal, a contention which was struck down by the court. In any event, Judge Werker's decision was reached before Judge Frankel's, and thus

could not have been called to the attention of Judge Werker even if counsel had felt that one district judge should be bound by the decision of another in a different case.

Appellee contends that it is "obvious" that interest cannot precede the entry of judgment, but it was not so obvious to the Supreme Court in New York Elevated Railroad v. Fifth National Bank, 118 US 608 and Quebec Steamship Co. v. Merchant, 133 US 375. In both of those cases there had been a jury trial in the Southern District, ajury verdict for $5,000, and interest added from the date of the verdict to the date of the judgment. If the addition of interest were improper, the Supreme Court would not have had jurisdiction. In each case it was held that jurisdiction was proper. If reliance on such authority is "obtuse"' as suggested by appellee, such obtuseness originates in the opinion of the Court of Appeals for the Fifth Circuit in Louisiana and Arkansas R. Co. v. Platt, 143 F2d 847,849.

Neither is appellee correct in stating at page 15 of its brief "Plaintiff's citation of the New York CPLR and authorities therunder is completely out of order." As stated in the Platt case, 143F2d at pages 849-850.

" Said Section 966 of the Revised Statutes, while awarding interest from the date of judgment , does not exclude the idea of a power in the several states to allow interest upon verdicts. State statutes are superceded by the Federal Employers' Liability Act only in so far as they are in conflict therewith, and said Liability Act does not legislate upon interest after verdict; hence it is not in conflict with any state statute that allows interest from the date of verdict.. State and Federal courts exercise concurrent jurisdiction over causes arising under the Federal Employers' Liability Act; interest is essentially a question of local law; and, for purposes of harmony and uniformity of administration, state statutes relating to interest should be applied whenever it is practicable to do so."

Although the majority of judges in the Platt case chose to rest their allowance of interest between verdict and judgment on an equitable basis, the opinion clearly demonstrates a sound legal basis for applying the state statute.

POINT II

THE ERROR OF THE DISTRICT COURT IS REVIEWABLE HERE.

Perhaps realizing the factual weakness of its position, appellee has at pages 4 and 5 of its brief, and again at page 7, sought to praise the caliber of our district court judiciary, stating that "the District Court is not the retarded ward of the Appellate Court",

and implying that the determination of a motion for a new trial is "subjective" and that because it involves a "discharge of conscience" it should not be reviewable. Nobody has more respect for the fine caliber of the District Court judiciary than plaintiff, but judges are men, and overworked at that, and sometimes they do make mistakes.

It is difficult to understand how the trial court could possibly be in any better position than this Court to determine whether the record supports certain mathematical calculations, and thus to determine the maximum amount of damages justified by the evidence for loss of earnings. Although the cases discussing the circumstances under which the action of the trial court in ruling on a motion for a new trial will be reversed use the phrase "abuse of discretion", it is difficult to obtain an accurate and consistent definition of what constitutes "abuse of discretion". Does it imply more or less than the term "clearly erroneous", or is it the same standard expressed in different words? In logic and in justice, when considering the action of a trial judge in taking away what a jury has awarded, such action should be subjected to closer scrutiny than if the action were simply a denial of an new trial or remittitur.

It is interesting indeed that in commenting upon the

deference to be accorded to the trial judge, counsel for appellee chose to quote from the case where the appellate court reversed the action of the trial judge in granting a remittitur. The case is Taylor v. Washington Terminal Co., 409 F2d 145, cited at page 4 of appellees brief, in which the court discussed the "elusive phrase'abuse of discretion". Appellee chose to quote at page 5 of brief part of a sentence from the opinion in that case. It is submitted that the full paragraph and the following one are particularly relevant to the instant case. (409 F2d at page 148)

> " This learning has largely arisen from the consideration of cases in which motions for a new trial--especially on the ground of excessive verdict--have been denied. Two factors unite to favor very restricted review of such orders. The first of these is the deference due the trial judge, who has had the opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record. The second factor is the deference properly given to the jury's determination of such matters of fact as the weight of the evidence and the quantum of damages. This second factor is further weighted by the constitutional allocation to the jury of questions of fact.
>
> Where the jury finds a particular quantum of damages and the trial judge refuses to disturb its finding on the motion for a new trial, the two factors press in the same direction, and an appellate court should be certain indeed that the award is contrary to all reason before it orders a remittitur or a

new trial. However, where, as here, the jury as primary fact-finder fixes a quantum, and the trial judge indicates his view that it is excessive by granting a remittitur, the two factors oppose each other. The judge's unique opportunity to consider the evidence in the living courtroom context must be respected. But against his judgment we must consider that the agency to whom the Constution allocates the fact-finding function in the first instance-the jury- has evaluted the facts differently. "

See also Lind v. Schenley Industries, Inc, 278 F2d 79, cert. denied 364 US 835, where the court comments on the close scrutiny which is required on the part of the appellate court in order to protect the litigants' right to jury trial, 278 F2d at page 90.

Counsel for both parties have cited the case of Gorsalitz v. Olin Mathieson Chemical Corp., 429 F2d 1033, a case in which the Court of Appeals remanded to the district court for determination of the proper amount of the remittitur. The case is reported again at 456 F2d 180, after the district court had recomputed the remittitur. It is extremely interesting to note that the Court of Appeals found the amended remittitur of approximately $500,000 to be excessive by $2,237, because of a mistake by the trial judge in calculating loss of earnings--- precisely the same sort of mistake and oversight which appellant claims here. A simple mistake or omission in

calculation of lost earnings can constitute "abuse of discretion", and can be corrected in the interest of justice.

In discussing the power of the trial court to set aside a jury's verdict for excessiveness, or to conditionally deny such a motion upon accepting a remittitur, appellee has cited, inter alia, Fiskratti v. Pennsylvania R. Co., 147 F Supp. 765, a Southern District of New York case where the motion denied because, as the court said at page 767:

> " a verdict will not be set aside in a case of tort for excessive damages unless the court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated, that is, unless the verdict is so excessive or outrageous, with reference to all the circumstances of the case as to demonstrate that the jury have acted against the rules of the law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them. In no case is it permissible for the court to substitute itself for the jury, and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice, which the jury itself is the appointed constitutional tributal to award "

CONCLUSION

The judgment of the District Court should be reversed with directions to enter judgment on the jury's verdict for $90,000.00 together with interest theron from the date of the verdict.

Respectfully submitted,

PAUL C. MATTHEWS
Attorney for Plaintiff-Appellant
Office and P. O. Address
11 Broadway
New York, NY 10004

Paul C. Matthews, Attorney at Law, 11 Broadway, New York 10004
344-1936

October 8, 1974

Answered 10/9.

The Honorable Murray I. Gurfein
U. S. District Judge
Chambers
U. S. Courthouse
Foley Square
New York, N. Y. 10007

Re: Donovan v. Penn Shipping
70 Civ. 3572 MIG

Honorable Sir:

I have been notified of your Honor's denial of my motion for reargument and your adherence to your previous decision ordering a new trial in this matter unless the plaintiff accept a remittitur of $25,000.

I have spoken with Mr. Donovan and he does not wish to go through the agony of another trial. We do wish, however, to obtain appellate review of your Honor's decision. We will therefore accept the remittur under protest.

My procedural task in this matter would be considerably simplified if your Honor would certify the order of remittitur and the subsequent order denying reargument as orders effecting the outcome of the litigation, and that the determination of the litigation will be advanced by permitting the plaintiff to appeal therefrom; otherwise there is some uncertainty in my mind as to whether I should proceed by mandamus or appeal.

Respectfully yours,

/s/ Paul C. Matthews

PCM/gd
cc: Darby, Healey, Stonebridge & Whelan, Esqs.

So let's assume that those are three months that he would have been working and not, as I say, the other three and a third months when he might be -- let's charge the whole three months.

This means that during that period of time, thirteen and a half months we have three and a half months under treatment, that is sixteen and a half months. So that during that time he has lost nine and a half months.

In other words, I am taking sixteen and a half away from twenty-six, and I am coming up with nine and a half.

Before I get to that, I think I should take care of the first thing, which is what he was earning at the time, and the figures are right in evidence, $950 per month. A combination of his base pay and his overtime, plus a thousand dollars in his vacation pay, so that's $1,050 a month for six months; we'll call it $6,000.

Now, for this nine and a half months since then, I must point out there is an Exhibit 10 in evidence, and Exhibit 10 shows the increase in the wages as they have gone up from year to year, and you can do the arithmetic, and the dates in here that the tanker rate is about $8 more than what's on here because these men work on freight

ships and tank ships; this is the freight ship rate.

But if you check it out, I think you will find that from the time of his accident up to now, there has been a $115 per month increase in the base pay and $125 per month increase, as far as the premium time is concerned.

Now, I think maybe I have to explain that calculation to you, although I don't think I am going to have room on the board.

The premium time covers simply Saturdays, Sundays and holidays. The Saturdays and Sundays, there's four and a third weeks in a month; so there's sixteen hours on a week end. Sixteen hours a week premium pay, which, if my arithmetic is right, that comes to sixty-nine hours per month based upon the premium pay for the Saturdays and Sundays, and there are nine paid holidays per year, so that's three-quarters of one holiday per month, if you will, which would be six hours per month attributable to the holidays, so that's seventy-five hours of premium pay, and the premium pay is $1.65, but they didn't even have it before. It's $1.65 --

MR. HEALEY: Is that all in evidence?

MR. MATTHEWS: It's all in evidence, yes. It's right in there, Mr. Healey.

MR. HEALEY: Let me see it.

(Mr. Matthews hands paper to Mr. Healey.)

MR. MATTHEWS: It's $1.65 per hour more than the regular overtime, so that therefore --

THE COURT: More than overtime or more than base pay?

MR. MATTHEWS: No, your Honor, more than regular overtime. They were getting $3.44 previously for working Saturday and Sunday.

MR. HEALEY: This stuff isn't in evidence.

MR. MATTHEWS: It is.

MR. HEALEY: He showed me this and none of this is in evidence. If you give me an idea before you start.

Take a look, Judge. I don't know what he's talking about.

MR. MATTHEWS: Your Honor, the premium pay, there has been testimony as to what it is, work for Saturdays and Sundays.

THE COURT: Where is the premium pay here?

MR. MATTHEWS: It's on the right-hand column, your Honor.

THE COURT: That is overtime.

MR. MATTHEWS: The first right-hand column is overtime, $3.44. The overtime figure remains constant.

MR. HEALEY: This has never been explained to

anybody. I think, in fairness, it should have been told to somebody.

MR. MATTHEWS: I think the jury's recollection will prevail as to whether there has been testimony about premium pay or not.

THE COURT: No, I asked myself whether everybody agreed or understood what it means but --

MR. HEALEY: My point is, Judge, I don't think there was ever any proof on this.

MR. MATTHEWS: At any rate, 75 hours and increase the difference between the old rate and the new rate is $1.65 per hour. So that is $125 per month increase on account of the premium pay and $115 per month based on the base pay, so that, in other words, you have $240 a month more that they are earning now than they were earning back in 1970, which is not unusual, because I think we all know what's happened to prices and what's happened to wages in that period of time.

So it's not at all out of line.

I simply point that out before I bring on the next figure because I am really just going to use the old figure, but I want you to understand that you have it within your power to use the increases that have been had during that time but even just nine and a half months

at $1,050 that he was earning before, that's a loss of $10,000 without using any increased figures.

Now also he has lost during that time, and you have heard his testimony, which was uncontradicted about it, about forty hours of the regular overtime per month. So that during the time that he has worked of thirteen and a half months, he has lost about $135 per month during that time. Well, it's not a large figure, but it's something that's going to continue whenever he --

THE COURT: I don't understand your nine and a half months, $10,000. If I don't, the jury may not. I am just calling your attention to it.

MR. MATTHEWS: Thank you, your Honor.

I said nine and a half months and I shouldn't have. Thirteen and a half.

During the thirteen and a half months that he actually has worked since this accident, thirteen and a half, at $135 a month, is $1,800.

Also, I would point one further thing because I am now going to talk to you about the future loss. The contract which is presently in effect, and that is what I am going to talk to you about, ladies and gentlemen, we know with certainty what the pay of seamen in this union will be up until June 15th of 1975; and after that

date, we don't know for sure what it's going to be. I am going to be putting figures on that board based solely on those figures, what we know it's going to be. I think your common sense will tell you that it's not likely that for the ten remaining years that Mr. Donovan could otherwise have worked as an able-bodied seaman, that the wages would remain constant. I don't think any of us would assume that. But you just have to use your general knowledge of conditions.

So that with these additional increases that take place coming into effect on the 16th of June of this year, there will be an additional increase of approximately $20 in the base pay, and of $.25 per hour in this premium overtime, which comes then to $38 per month. And by that I mean a total of $38 per month, so that the difference between what he was making in 1970 and what he will be making if he is able to work on June 16th of this year would be $278. So you have got $950 that he was making before, plus a hundred for vacation, which is constant; that's $1,050 plus $278 is approximately, roughly $1,330 per month. And I am going to use, and this is assuming the most favorable medical prognosis that you possibly could have, assuming this fellow doesn't get any worse, assuming that he

doesn't suddenly have to leave the sea during that eleven years, you may find, and you are justified, I submit, in finding from the evidence that this career may end either gradually or suddenly with the increase in this arthritis, but the figures that I am going to put on the board I want to make clear to you are based solely upon the status quo.

So we're talking now about a loss of four months per year, and for four months per year, at $1,330, it's $5,300, or roughly, I guess, it's $5,320, but $5,300. And, in addition to that -- well, I guess it's actually -- well, I worked with $5,300, so that is what I will use. In addition to that 44-2/3 months which we assume that he is working, if he is lucky enough to be able to do that, he will be losing at the rate of $135 per month in the overtime, so that's an additional $630 per year.

That makes a total loss of $5,930 per year, just assuming that he is able to go on the way he has.

I worked this out for the eleven years of his work expectancy until sixty-five, and it comes up with a figure which I will put over to the side here, and I will explain to you in a minute, eleven times this figure, if my arithmetic is correct, is $65,230, but we know that his Honor will instruct you that as to these future losses,

even though we don't know about how prices are going to go up or wages are going to go up, so these future losses you should apply a certain rule of thumb and should discount them by a percentage equal to the number of years that you are applying this loss.

So, if you assume eleven years, you have got to deduct eleven percent of this figure, and I have computed that as $7,175, and that makes a net loss, future loss, of $58,000 net loss after discount.

Those are the hard money figures in this case, assuming the best; assuming that he is able to go on, assuming that he gets no worse.

Of course, as soon as his injuries and the pain force him to quit, the loss doubles, and that is up to you to figure out.

There are other items of damage which are so much more difficult for you to assess, and I know of no guideline to give you. There is no question that this man has a permanent injury and deformity of his wrist. That has been conceded, and that is, I think the Court will instruct you, a proper item of damages. It is up to you.

Would $25,000 for that item be too much? Perhaps it's not enough. It is within your discretion, your common sense, your good judgment.

MATTHEWS Donovan v. Penn Shipping 74-2694

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 26 day of March 197 6 deponent served the within Reply Brief upon:

Darby, Healey & Stonebridge, Esqs.

attorney(s) for

Appellees

in this action, at

19 Rector St.
NYC 10006

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 26
day of March 197 6.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1977